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07-942

No. 07-

IN THE
Supreme Court of the United States

EYOB MAMO and DAG PETROLEUM III, INC.

Petitioners,

v.

DISTRICT OF COLUMBIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When the direct and inevitable effect of the District of Columbia's condemnation of a retail service station property was to destroy completely Petitioners' gasoline franchise, business, and goodwill, are Petitioners entitled to just compensation under the Fifth Amendment of the United States Constitution for the value of the property destroyed?

CORPORATE DISCLOSURE STATEMENT

Petitioner Eyob Mamo is an individual. Petitioner DAG Petroleum III, Inc. has no parent corporation, no subsidiaries, and no publicly held corporation holds 10% or more of its stock.

Respondent, the District of Columbia, is a sovereign entity.

TABLE OF CONTENTS

	Page
Question Presented	i
Corporate Disclosure Statement	ii
Table of Contents	iii
Table of Appendices	v
Table of Cited Authorities	vi
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Petition	4
I. Review Is Warranted To Clarify That Under This Court's Precedent, When A Condemnation Causes The Immediate Loss Of Intangible Business Interests, The Fifth Amendment Requires Just Compensation For The Direct Damage Caused By The Taking.	5

Contents

Page

A. Misapplication of Precedent Has Created a Mythical "No Business Damages" Rule That Should be Corrected. 5

Conclusion 13

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The District Of Columbia Court Of Appeals Decided October 18, 2007 ..... 1a

Appendix B — Order Of The Superior Court Of The District Of Columbia, Civil Division Dated July 28, 2006 ..... 25a

Appendix C — Amended Order Of The Superior Court Of The District Of Columbia, Civil Division Dated June 26, 2006 ..... 27a

Appendix D — Order Of The Superior Court Of The District Of Columbia, Civil Division Dated April 21, 2006 ..... 36a

Appendix E — Order Of The Superior Court Of The District Of Columbia, Civil Division Dated March 1, 2005 ..... 40a

TABLE OF CITED AUTHORITIES

Page

Cases:

Almota Farmers Elevator and Warehouse Co. v. United States, 409 U.S. 470 (1973) 12

Armstrong v. United States, 364 U.S. 40 (1960) 8, 9, 11

Kimball Laundry Co. v. United States, 338 U.S. 1 (1949) 7, 8, 9, 11

Mitchell v. United States, 257 U.S. 341 (1925) 4, 9, 10, 11, 12

Monongahela Navigation Co. v. United States, 148 U.S. 312 (1882) 5, 6, 9, 11

State v. Saugen, 169 N.W.2d 37 (Minn. 1969) 12

State of Alaska v. Hammer, 550 P.2d 820 (Alaska 1976) 4

State of Nevada v. Cowan, 103 P.3d 1 (Nev. 2004) 12

State of New Jersey v. Cooper Alloy Corp., 136 N.J. Super. 560 (App. Div. 1975) 4

United States v. Commodities Trading Corp., 339 U.S. 121 (1950) 12

Cited Authorities

	Page
United States v. General Motors, 323 U.S. 373 (1945)	10, 11
United States v. Petty Motor Co., 327 U.S. 372 (1945)	11
United States ex rel. Tenn. Valley Auth. v. Powelson, 319 U.S. 266 (1943)	11
Wilmington Railroad v. Reid, Sheriff, 80 U.S. 264 (1871)	7
United States Constitution:	
Fifth Amendment	*passim*
Rule:	
Supreme Court Rule 10(c)	5
Statutes:	
15 U.S.C. § 2801, *et seq.*	2
28 U.S.C. § 1257(a)	1
28 U.S.C. § 1257(b)	1

Page

Other Authority:

D. Michael Risinger, DIRECT DAMAGES: THE LOST KEY TO CONSTITUTIONAL JUST COMPENSATION WHEN BUSINESS PREMISES ARE CONDEMNED, Seton Hall Law Review, Vol 15:483 (1985) 5, 9

OPINIONS BELOW

The decision of the District of Columbia Court of Appeals is reported at *Eyob Mamo et al. v. District of Columbia*, 934 A.2d 376 (D.C. 2007). *See* Appendix A. This decision affirmed two unreported Orders of the Superior Court of the District of Columbia dated July 28, 2006 and June 26, 2006. *See* Appendices B and C.

STATEMENT OF JURISDICTION

The District of Columbia Court of Appeals' opinion was rendered on October 18, 2007. This Court has jurisdiction under 28 U.S.C. §§ 1257(a) and (b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Eyob Mamo ("Mamo"), and his wholly-owned corporation DAG Petroleum III, Inc. ("DAG") (collectively "Petitioners") seek compensation for the value of the franchise, business and goodwill lost as the direct result of the condemnation by the District of Columbia ("District") of an "Amoco" service station property at 1234 Good Hope Road, S. E., Washington, D.C. (the "Property"). Petitioners operated a retail Amoco station at the Property pursuant to written agreements with BP Products North America, Inc., f/k/a Amoco Oil Company ("BP").

It was undisputed that but for the condemnation, the franchise would have continued indefinitely. Indeed, BP, which owned the real property, agreed in the condemnation proceedings that it had no other reason for ending the franchise, which was federally protected under the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. § 2801, *et seq*. It was also undisputed that retail petroleum franchises such as the one involved here are unique and site specific, and that the franchise and business involved here was *not* one that could be moved to another location. Finally, it was undisputed that before the condemnation Petitioners had a valuable business. After the condemnation, they had nothing.

In July 2004, the District initiated condemnation proceedings to take the Property upon filing in the District of Columbia Superior Court a Complaint in Condemnation Pursuant to Declaration of Taking ("District's Complaint"). Mr. Mamo was named as a defendant in that case ("Case 1"). Petitioners filed an

Answer and Counterclaim that raised a Federal takings question and sought just compensation under the Fifth Amendment for the value of the business, franchise and goodwill that would inevitably be taken as a direct result of the condemnation. The Superior Court granted the District's motion to dismiss the Counterclaim, finding, among other things, that Petitioners' claims were effectively raised in the Answer. *See* Appendix E. Thereafter, the court granted the District's Motion for Possession, after which BP and Petitioners surrendered possession of the Property.

The Superior Court eventually granted the District's motions *in limine* and for summary judgment, *see* Appendices D and B, finding that the Fifth Amendment did not entitle Petitioners to the intangible value of the business lost as a result of the condemnation. Meanwhile, before any dispositive rulings had been issued in Case 1, Petitioners (as plaintiffs) filed a protective second case ("Case 2") as a precaution to address procedural concerns advanced by the District that Petitioners' claims for compensation separate from the real estate interest could only be raised in an independent action. The court granted the District's Rule 12(b)(6) motion and dismissed Case 2 on *res judicata* grounds. *See* Appendix B. Petitioners filed timely appeals to the District of Columbia Court of Appeals.

The Court of Appeals reviewed Petitioners' claim for relief under the Fifth Amendment. On October 18, 2007, *see* Appendix A, the Court of Appeals affirmed the lower court's judgment, holding that:

> Under general principles governing the Fifth Amendment Taking [sic] Clause, Mr. Mamo

> was not entitled to 'consequential damages' for business losses, or even for the destruction of his business.

934 A.2d at 384.

In reaching this conclusion, the Court of Appeals relied chiefly on this Court's decision in *Mitchell v. United States*, 257 U.S. 341 (1925) and its progeny. The Court of Appeals found that these cases barred recovery for Petitioners' intangible business losses — which the Court labeled "consequential" — even though such losses resulted directly and immediately from the condemnation.

REASONS FOR GRANTING THE PETITION

Whether business interests destroyed as a direct result of a condemnation are compensable under the Fifth Amendment Takings Clause is an important federal question that requires a uniform national resolution. Courts from around the country have applied the Takings Clause inconsistently, have reached conflicting results,[1] and in the process have revealed that this Court's precedents are misunderstood and/or are routinely misapplied. This Court's original finding, that interests

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1. *Compare State of Alaska v. Hammer*, 550 P.2d 820, 824 (Alaska 1976) (labeling denial of damages for loss of business interests in condemnation cases "unacceptable"); *State of New Jersey v. Cooper Alloy Corp.*, 136 N.J. Super. 560, 568 (App. Div. 1975) ("just compensation generally does not include losses or costs that are incidental to a taking such as loss to or destruction of good will, loss of profits, inability to relocate, or frustration of the condemnee's plans.").

like these are compensable, dating back to the 1882 decision of *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1882) ("Monongahela"), has slowly morphed into a mythical "no business damages" rule that has no Constitutional underpinning. *See generally* D. Michael Risinger, DIRECT DAMAGES: THE LOST KEY TO CONSTITUTIONAL JUST COMPENSATION WHEN BUSINESS PREMISES ARE CONDEMNED, Seton Hall Law Review, Vol 15:483 (1985) (hereafter cited as "Risinger"). Respectfully, this Court should grant a writ of certiorari to re-establish, clarify, and vindicate the principle that the Government's direct destruction of intangible business interests through eminent domain requires just compensation under the Fifth Amendment.

I. Review Is Warranted To Clarify That Under This Court's Precedent, When A Condemnation Causes The Immediate Loss Of Intangible Business Interests, The Fifth Amendment Requires Just Compensation For The Direct Damage Caused By The Taking.

A. Misapplication of Precedent Has Created a Mythical "No Business Damages" Rule That Should be Corrected.

The Court should accept this case for review because the District of Columbia Court of Appeals decided an important question of Federal law — whether the Fifth Amendment requires compensation for intangible property interests destroyed directly by a condemnation — in a way that conflicts with the relevant decisions of this Court. *See* Supreme Court Rule 10(c). Contrary to

the lower court's holding, this Court has recognized that a franchise and business destroyed by condemnation, which cannot be relocated, is constitutionally protected property.

In *Monongahela, supra*, this Court held that a navigation company was entitled to compensation not just for the value of the lock and dam condemned, but also for the value of the franchise to collect tolls. That franchise was directly and immediately destroyed by the taking of the physical property. This Court held as follows:

> But this franchise goes with the property; and the navigation company, which owned it, is *deprived* of it . . . the question of just compensation is not determined by the value to the government which takes, but the value to the individual from whom the property is taken; and when by the taking of the tangible property the owner is actually deprived of the franchise to collect tolls, just compensation requires payment, not merely of the value of the tangible property itself, but also of the franchise of which he is *deprived.*

148 U.S. at 343 (emphasis added). The result in *Monongahela* was based on the market value of what the government took *from* the company, not whether the government itself intended to use the right to collect tolls. Thus, since the late nineteenth century, this Court has understood that where condemnation of real property directly destroys a business conducted on that property, just compensation must be paid to the business

owner for the value of what has been taken. *See also Wilmington Railroad v. Reid, Sheriff*, 80 U.S. 264, 268 (1871) ("Nothing is better settled than that the franchise of a private corporation . . . is property, and of the most valuable kind, as it cannot be taken for public use even without compensation.").

In 1949, this Court decided *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949), and held that "an exercise of the power of eminent domain which has the *inevitable effect* of depriving the owner of the going concern value of his business is a compensable 'taking' of property." *Id.* at 13. *Kimball* involved the federal government's occupation of a laundry facility for use by the army during World War II. Although the government paid Kimball rent for the period of occupation, no compensation was provided for the loss of customers or diminution in going business value which resulted from Kimball's temporary cessation of the laundry operation. This Court held that Kimball was entitled to compensation from the government for this loss, noting that although going concern value is an intangible asset, when it is shown to exist and to have been "taken," its loss must be compensated. *Id.* at 11.

Under this Court's "inevitable effects" test as enunciated by Justice Frankfurter in *Kimball Laundry*, the crucial fact is the non-transferability of the intangible elements of the business. In the case of the "usual taking" where the business owner is "free to move his business to a new location," *id.* at 11, the owner does not lose the going concern value. But where (as here) the taking has the "inevitable effect" of depriving the owner of that

going concern value, compensation for intangible business interests is required.[2]

Other cases make clear that under this Court's prior authority, property other than real property, if taken by the government for public use, is compensable under the Fifth Amendment. For example, in *Armstrong v. United States*, 364 U.S. 40 (1960), a case dealing with the destruction of liens on a vessel by virtue of its transfer to the United States, this Court stated:

> The total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of the Fifth Amendment "taking" and is not a mere "consequential incidence" of a valid regulatory measure. Before the liens were destroyed, the lienholders admittedly had compensable property. Immediately afterward, they had none. This was not because their property vanished into thin air. It was because the Government for its own

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2. The rationale in *Kimball Laundry* was that compensation was due to the condemnee in part because of the "narrow[] range of alternatives" with which the temporary taking left it. 338 U.S. at 15. This is the same reason why compensation is mandated in a case such as this: condemnees such as Petitioners are left with *no alternatives* where their business has been destroyed with no chance of relocation. If, as the lower Court found, a condemnation leaving a condemnee with few alternatives "substantially increases the condemnor's obligation to him," 934 A.2d at 383, certainly, a condemnation that leaves a condemnee with *no alternatives*, even more strongly supports the right to compensation.

> advantage destroyed the value of the liens, something . . . which no private purchaser could have done. Since this acquisition was for a public use, however accomplished, whether with an intent and purpose of extinguishing the liens or not, the Government's action did destroy them and in the circumstances of this case did thereby take the property value of those liens within the Fifth Amendment.

364 U.S. at 48. *See also* Risinger at p. 513.

The rationale in *Armstrong* compels compensation here, and reinforces the holding in *Monongahela*, that compensation is required based on the value of what the government *takes from* the condemnee, not whether the government itself intends to assume operation of the business. Here, before the franchise was destroyed, Petitioners had valuable compensable property. Immediately after the condemnation, they had none. Petitioners' property did not "vanish into thin air"; rather the business was destroyed solely because the government took the underlying property, and it does not matter that the District government had no intention of taking over Petitioners' business.

Despite this Court's early recognition of the entitlement to compensation in *Monongahela*, as later confirmed in *Kimball Laundry* and *Armstrong*, the Court of Appeals below denied compensation in large part on the basis of *Mitchell v. United States*, 267 U.S. 341 (1925) and cases of this Court citing to *Mitchell*, which the lower court construed as barring compensation. *Mitchell*, however, simply does not stand

for the proposition for which it is cited, *i.e.*, that the loss of intangible business interests are necessarily "consequential" in nature and thus just compensation is never due for their taking. The destruction of the business claimed in *Mitchell* was *not* the result of the taking of the plaintiff's canning factory property *per se.* Instead, the damage was claimed to result from the condemnation of the surrounding land belonging to others. Thus, the issue in *Mitchell* was whether the plaintiffs' relationship to those *other* government takings gave them any claim to Fifth Amendment compensation. Indeed, when Justice Brandeis referred to the "unintended incident of the taking of land", 267 U.S. at 345, he was referring to land around plaintiffs' land that was owned by others. The damages sought by plaintiffs were thus labeled "consequential" because plaintiffs sought damages caused by the takings of the *surrounding* land in which they never possessed an interest. Plaintiff's damages in *Mitchell* were indeed consequential under the facts of that case; however, those facts are very different from cases such as this where the damage is "direct" and immediate.

While *Mitchell* did involve a claim for "consequential" losses, the holding in *Mitchell* later formed the basis for language found in subsequent decisions of this Court that have been misconstrued as establishing an absolute "no business damage" rule in condemnation cases generally, under the erroneous assumption that all business losses are "consequential."[3]

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3. *See, e.g., United States v. General Motors*, 323 U.S. 373, 380 (1945) (citing *Mitchell* and holding "[t]he sovereign ordinarily takes the fee. The rule in such a case is that compensation for

(Cont'd)

Meanwhile, in cases such as this, the damage to the business owner who loses his or her business as a result of the condemnation is no less "direct" than the damage to the owner of the fee whose real estate has been taken. *Mitchell* and its progeny were interpreted by the Court of Appeals below as classifying business damages as "consequential" and not within the scope of required Fifth Amendment compensation. Such an interpretation cannot be squared with *Armstrong*, *supra*, 364 U.S. at 48 ("[t]he total destruction by the Government of all value of [the compensable property] has every possible element of the Fifth Amendment 'taking and is not a mere 'consequential incidence of [the taking]"). Mislabeling direct business losses as "consequential" cannot, consistent with *Monongahela*, *Kimball Laundry*, *and Armstrong*, avoid the Fifth Amendment's requirement of just compensation.

(Cont'd)

that interest does not include . . . the loss of good-will which inheres in the location of the land, or other like *consequential losses* which would ensue the sale of the property to someone other than the sovereign.") (emphasis supplied); *United States ex rel. Tenn. Valley Auth. v. Powelson*, 319 U.S. 266, 282 (1943) (citing *Mitchell* as standing for the proposition that "settled rules of law preclude[] a consideration of consequential damages for losses of a business or its destruction. . . .") (internal citations omitted); *United States v. Petty Motor Co.*, 327 U.S. 372, 377-78 (1945) (citing *Mitchell* and holding "demand for the property, evidence of loss of profits, damage to good will, the expense of relocation and other such *consequential losses* are refused in federal condemnation proceedings.") (emphasis supplied). The Court of Appeals expressly relied on *General Motors* and *Powelson* in rejecting Petitioner's claim. *See* 934 A.2d at 382.

This Court recognized in *Almota Farmers Elevator and Warehouse Co. v. United States*, 409 U.S. 470, 478 (1973), *citing United States v. Commodities Trading Corp.*, 339 U.S. 121, 124 (1950), that "'[t]he constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness as it does from technical concepts of property law.'" When Petitioners' property was destroyed completely and directly by the Government's action, the Fifth Amendment and its equitable principles of fairness compel just compensation.[4]

This case presents a unique opportunity for the Court to clarify that *Mitchell* does not automatically classify all business damages as "consequential" and not recoverable and that *Mitchell* does not preclude Fifth Amendment compensation when the facts show that the Government's taking had the direct, immediate and "inevitable effect" of destroying a going business concern.

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4. Various state courts, interpreting functionally identical versions of their State constitutions, have reached this result. *See, e.g., State of Nevada v. Cowan*, 103 P.3d 1, 5 (Nev. 2004) ("the lease's value was inextricably tied to the unique location of the real estate that was condemned . . . [t]herefore the State must compensate the [dealers] for the destruction of their business. . . ."); *State v. Saugen*, 169 N.W.2d 37, 46 (Minn. 1969) (granting damages where "[t]he exercise of the right of eminent domain effectively destroyed appellant's valid and unrevoked ability to continue to engage in the liquor business.").

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE DISTRICT OF COLUMBIA COURT OF APPEALS DECIDED OCTOBER 18, 2007

DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 06-CV-845 & 06-CV-1007

EYOB MAMO, *et al.*,

Appellants,

v.

DISTRICT OF COLUMBIA,

Appellee.

(Argued September 13, 2007 Decided October 18, 2007)

Before FARRELL, REID and FISHER, *Associate Judges.*

REID, *Associate Judge*: In this case, appellee, the District of Columbia, exercised its power of eminent domain to take property on which appellants, Eyob Mamo and DAG Petroleum III, Inc. ("Mr. Mamo" or "Mamo/DAG" or "DAG Defendants"), operated a gas station and convenience store franchise. Mr. Mamo complains that the trial court's judgment in favor of the District violated his constitutional Fifth Amendment right to just compensation because: (1) he received no compensation for his franchise, business and goodwill;

and (2) the District is estopped from denying him such compensation. Discerning no error, we affirm the judgment of the trial court.

FACTUAL SUMMARY

The record shows that, as of 2006, Mr. Mamo had been involved in the motor fuel business for about twenty years. He was a gas service station dealer/franchisee with Amoco Oil Company (now BP Products North America, Inc. ("BP")), and later, also a Shell motor fuel distributor through a Shell affiliate. He and the company in which he is the sole shareholder, DAG, obtained the right to operate the Good Hope Amoco gas station and convenience store (located at 1234 Good Hope Road, in the Southeast quadrant of the District) in 1996, through a renewable franchise agreement with Amoco/BP, and he continued to conduct his business there until the District prepared to take the property for the purpose of constructing a municipal office building.

In early July 2004, the then Mayor of the District, Anthony A. Williams, executed a Declaration of Taking for the Good Hope Road land and improvements which housed Mr. Mamo's business. The Declaration specified that $680,000 was the estimated just compensation for the taking of "the Property, including all interests therein." Paragraph 19(*l*) of Mr. Mamo's franchise agreement provided that BP could "terminate or nonrenew" his agreement in the event of "[c]ondemnation or other taking, in whole or in part, of the facility pursuant to the power of eminent domain."

BP sent a letter to Mr. Mamo on May 18, 2003, terminating and nonrenewing his franchise agreement, "effective ten (10) days prior to the date of condemnation or date of sale in lieu of condemnation." On July 2, 2004, the District filed against BP and others a civil complaint in condemnation pursuant to the Declaration of Taking, and an amended complaint on October 1, 2004 (Appeal No. 06-CV-845).

Mr. Mamo lodged an answer and counterclaim on October 25, 2004, alleging a "taking" of his "property," "the Good Hope Amoco Business, including the franchise, leasehold interest and goodwill." As affirmative defenses, he cited the Fifth Amendment to the Constitution; D.C.Code § 16-1314 (2001) (concerning condemnation procedures and transfer of title); and estoppel. His counterclaim asserted, in part: "By letter dated October 27, 2000 . . . , the [District], through its Department of Housing and Community Development, advised the Mamo/DAG Claimants that they would 'be properly compensated for [their] leasehold interest; [their] business; and goodwill' upon any condemnation." Mr. Mamo demanded just compensation of $500,000 for the District's alleged taking of his property. Subsequently, in response to the District's motions, the trial court (the Honorable John M. Campbell) granted possession of the Good Hope Road property to the District in January 2005, and dismissed Mr. Mamo's counterclaim in March 2005.

On March 15, 2005, the District filed a motion in limine to preclude Mr. Mamo from introducing evidence

relating to the market value of his Good Hope Road business, on the ground that the District could only compensate for a taking of "property," and thus could not pay the value of Mr. Mamo's business. Judge Campbell denied the District's motion in April 2005, but the District filed a motion in May 2005, to vacate the denial, alleging that Mr. Mamo was not entitled to consequential damages under D.C.Code § 16-1311[1] and relevant case law. Mr. Mamo opposed the motion.

In August 2005, the District and BP lodged a joint application for the distribution of $722,180 to BP from the Court's Registry.[2] On October 20, 2005, Judge

1. D.C.Code § 16-1311 (2001) provides:

> § 16-1311. Condemnation proceedings by District of Columbia
>
> When real property in the District of Columbia is needed by the Mayor of the District of Columbia for sites of schoolhouses, fire or police stations, rights-of-way for roads, highways, streets and alleys or parts thereof, rights-of-way for water mains or sewers, or any other authorized municipal use, and that property cannot be acquired by purchase from the owners thereof at a price satisfactory to the officers of the District authorized to negotiate for the property, a complaint may be filed in the Superior Court of the District of Columbia in the name of the District of Columbia for the condemnation of the property or rights-of-way and the ascertainment of its value.

2. The District deposited an additional sum of $42,180 into the Court's Registry in October 2005, to increase the already deposited $680,000 to $722,180.

Campbell ordered that the funds be distributed to BP. Mr. Mamo's opposition to the distribution of the funds, filed on October 24, 2005, indicated that the Registry funds were earmarked to compensate "all interests" and " 'all persons entitled' to such compensation." In its October 27, 2005, reply to Mr. Mamo's opposition, BP took the position that the District and BP lawfully agreed on BP's compensation pursuant to D.C.Code § 16-1314,[3]

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3. D.C.Code § 16-1314 states:

> § 16-1314. Declaration of taking; contents; deposit; transfer of title; determination; interest
>
> (a) In an action pursuant to this subchapter, the plaintiffs may file in a cause, with the complaint or at any time before judgment, a declaration of taking, signed by the Mayor, declaring that the property is thereby taken for use of the District of Columbia. The declaration of taking shall contain or have annexed thereto a—
>
> (1) statement of the authority under which and the public use for which the property is taken;
>
> (2) description of the property taken sufficient for the identification thereof;
>
> (3) statement of the estate or interest in the property taken for public use;
>
> (4) plan showing the property taken; and
>
> (5) statement of the sum of money estimated by the Mayor to be just compensation for the property taken.

(Cont'd)

and that "the DAG [D]efendants are currently litigating with the District the issue of whether they are entitled to their own award by virtue of the closing of their business." BP also maintained that the District's position is that Mr. Mamo is not entitled to such compensation; and further, that "the DAG Defendants' franchise agreement explicitly provides that they have no right to share in any condemnation proceeds received by BP," under Paragraph 25 of the agreement ("Unless otherwise provided by law, Lessor is entitled to the full amount of

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(Cont'd)

> (b) Notwithstanding section 16-1319 [concerning payment and transfer of title to the District], upon the filing of the declaration of taking and the deposit in the registry of the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in the declaration, title to the property in fee simple absolute, or such less estate or interest therein as is specified in the declaration, shall vest in the District of Columbia, and the property shall be deemed to be condemned and taken for the use of the District, and the right to just compensation therefor shall vest in the persons entitled thereto. The compensation shall be ascertained and awarded in the proceedings and established by judgment therein, and the judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from that date to the date of payment. Interest may not be allowed on as much thereof as has been paid into the registry. A sum so paid into the registry may not be charged with commissions or poundage.

any award or proceeds for condemnation or other taking of the premises, in whole or in part, pursuant to the power of eminent domain or pursuant to a conveyance in lieu of condemnation.").

After reviewing additional case law, Judge Campbell issued an order on April 24, 2006, vacating his previous order and granting the District's motion in limine relating to its condemnation lawsuit; he concluded that Mr. Mamo could not recover damages "for the fair market value of [his] business, including such interests as good will." Consequently, he granted the District's motion to vacate his original order. The District submitted its motion for partial summary judgment on April 24, 2006, seeking judgment as a matter of law on the issue of Mr. Mamo's "entitle[ment] to just compensation for consequential damages to [his] Amoco business franchise and convenience store. . . ." On June 27, 2006, the Honorable Robert E. Morin issued an amended order (correcting certain typographical errors in his June 21, 2006 order) which treated Judge Campbell's order pertaining to the District's motion in limine not merely as a pretrial evidentiary ruling on the admissibility of certain evidence, but rather, as a decision on the same legal issue raised in the District's motion for partial summary judgment (that is, Mr. Mamo's entitlement to consequential damages under the Fifth Amendment). Judge Morin considered that decision as having "sufficient finality" and declined to revisit it. He also addressed Mr. Mamo's estoppel contention, concluding that even if the District made the representations alleged by Mr. Mamo, "[t]he purported

'injury' suffered by [him] as a result of these representations is at best amorphous," and even viewing the averments in the light most favorable to him, "Mr. Mamo makes no showing of any specific injury by Defendants."

A few days later, Judge Morin entered a consent order and final judgment, signed by counsel for BP and the District, which specified, in part, that (1) the $722,180 paid to BP "shall be just and full compensation, inclusive of all prejudgment interest, for the [ ] taking of all right, title and interest in and to the [Good Hope Road] Property. . . ."; and (2) "the Court having granted summary judgment to the District on the Mamo/DAG claim for compensation for the loss of the value of their business by Order entered June 21, 2006, Defendants Mamo/DAG have no leasehold interest, and the only interest to be compensated as a result of the Plaintiff's taking is that of Defendant BP Products North America, Inc., the former owner. . . ."

The court thereafter focused its attention on Mr. Mamo's lawsuit against the District, filed on February 17, 2006 (Appeal No. 06-CV-1007). Count 1 alleged a violation of the Fifth Amendment to the Constitution, and Count II asserted detrimental reliance. Paragraph 18 of the complaint declared: "The Good Hope Amoco Business, including its goodwill and franchise interest is 'property' for which the Mamo/DAG are entitled to just compensation pursuant to the Constitution of the United States, Amendment V, and the District through its actions is estopped from denying the entitlement of

Mamo/DAG to such compensation." Judge Morin granted the District's motion to dismiss "on the basis of res judicata and/or collateral estoppel, because the Court has previously decided the same issue Plaintiff uses as a basis for the compensation in this case."

Mr. Mamo filed appeals concerning both the District's and his own lawsuit. This court consolidated his appeals.

ANALYSIS

Mr. Mamo contends that the trial court erred by granting summary judgment to the District in the case brought by the District, and in dismissing his lawsuit. He argues that the court violated his constitutional Fifth Amendment right by "denying [him] just compensation for [his] franchise, business and goodwill destroyed by the District's condemnation of the [Good Hope Road] Property." The District maintains that neither District law, nor the Fifth Amendment to the Constitution, requires the payment of consequential damages or damages for business losses in eminent domain or Fifth Amendment taking cases.

Summary Judgment and Mr. Mamo's Fifth Amendment Claim

We review Judge Morin's order granting summary judgment in favor of the District and his order dismissing Mr. Mamo's complaint, *de novo*. *See Ward One Democrats, Inc. v. Woodland*, 898 A.2d 356, 360

(D.C.2006). "[W]e must assess the record independently . . . [and view it] in the light most favorable to the party opposing the motion." *Kelley v. Broadmoor Coop. Apartments*, 676 A.2d 453, 456 (D.C.1996) (citation and internal quotation marks omitted). "We will affirm the entry of summary judgment if there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." *Id.* (citations and internal quotation marks omitted).

The Fifth Amendment provides, in pertinent part, "nor shall private property be taken for public use without just compensation." U.S. Const. amend. V. We have not addressed the specific issue before us previously, whether the owner of a franchise business which occupies land taken by the District under its eminent domain power for public use, is entitled to compensation for business losses, goodwill, and other such consequential damages, under the Fifth Amendment. Therefore we first examine Supreme Court cases concerning claims for business losses, goodwill and other such consequential damages under the Fifth Amendment when land is taken for public use.

Supreme Court Cases: General Legal Principles

The plaintiffs in *Mitchell v. United States*, 267 U.S. 341, 45 S.Ct. 293, 69 L.Ed. 644 (1925) owned 440 acres of land in Maryland used to grow and can corn "of a special grade and quality." *Id.* at 343, 45 S.Ct. 293. The President of the United States issued a declaration that the land was needed to create a military facility, and the

government took the land through its power of eminent domain. Because the land was "especially adapted to the growing of the particular quality of corn," the plaintiffs were unable to re-establish their business elsewhere. *Id.* Plaintiffs complained that they received only $76,000 for the value of their land, appurtenances and improvements, but nothing for the business; consequently they brought a lawsuit seeking $100,000 as compensation for their canning business, on the ground that the business had been taken without just compensation as required by the Fifth Amendment. *Id.* The court acknowledged that the "special value of land due to its adaptability for use in a particular business is an element which the owner of land is entitled, under the Fifth Amendment, to have considered in determining the amount to be paid as the just compensation upon a taking by eminent domain." *Id.* at 344-45, 45 S.Ct. 293 (citations omitted). But, as the court declared, "[t]he settled rules of law . . . precluded [the President from] considering . . . consequential damages for losses to their business, or for its destruction." *Id.* at 345, 45 S.Ct. 293 (citing *Joslin Mfg. Co. v. Providence*, 262 U.S. 668, 675, 43 S.Ct. 684, 67 L.Ed. 1167 (1923)). *Joslin* reiterated the principle that: "Injury to a business carried on upon lands taken for public use . . . does not constitute an element of just compensation, in the absence of a statute expressly allowing it." *Joslin Mfg. Co.*, 262 U.S. at 675, 43 S.Ct. 684. Thus, in *Mitchell*, the court stated categorically that "[n]o recovery [for business losses or the destruction of the business] can be had [ ] as for a taking of the business." *Mitchell*, 267 U.S. at 345, 45 S.Ct. 293.

Almost twenty years after *Mitchell*, the Supreme Court reiterated the legal principle of no recovery for business losses, goodwill, or consequential damages in cases where property is taken for public use, in *United States v. General Motors Corp.*, 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945). There the court explained:

> The sovereign ordinarily takes the fee. The rule in such a case is that compensation for that interest does not include future loss of profits, . . . , the loss of "good-will" . . . , or other like consequential losses which would ensue the sale of the property to someone other than the sovereign. No doubt all these elements would be considered by an owner in determining whether, and at what price, to sell. . . . But the courts have generally held that they are not to be reckoned as part of the compensation for the fee taken by the Government.

Id. at 379, 65 S.Ct. 357 (footnote omitted). Since *Mitchell*, the court has repeated several times the principle that "absent a statutory mandate the sovereign must pay for only what it takes, not for opportunities which the owner may lose." *United States ex rel. Tenn. Valley Auth. v. Powelson*, 319 U.S. 266, 282, 63 S.Ct. 1047, 87 L.Ed. 1390 (1943). *See also, e.g., United States v. 564.54 Acres of Land*, 441 U.S. 506, 99 S.Ct. 1854, 60 L.Ed.2d 435 (1979) (in limiting just compensation to the fair market value of the land despite allegation that burdensome and costly regulations made relocation of the business operated on

the land impossible, court cites its previous "determination that nontransferable values arising from the owner's unique need for the property are not compensable"); *United States v. 50 Acres of Land*, 469 U.S. 24, 33, 105 S.Ct. 451, 83 L.Ed.2d 376 (1984) (reiterating that "the Fifth Amendment does not require any award for consequential damages arising from a condemnation").

Supreme Court Cases: Exceptions to General Principles

Despite these cases which articulate the clear legal principle that business losses, goodwill and other such consequential damages generally are not compensable under the Fifth Amendment Taking Clause, Mr. Mamo relies on other Supreme Court decisions which, he claims, require the District to compensate him for his business losses, franchise interest and goodwill. In his reply brief, he emphasizes *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 13 S.Ct. 622, 37 L.Ed. 463 (1893). That case is unique and rather complex.[4] The

4. The Monongahela Navigation Company ("the Company") received a charter from the State of Pennsylvania in 1836 to construct dams and locks relating to navigation on the Mon River between Pittsburgh and Virginia. The actual controversy, which was the subject of the litigation, arose after the Pennsylvania legislature enacted a supplement to the Company's charter and the Congress of the United States passed related legislation. The supplement and federal legislation concerned the construction of lock and dam No. 7 pertaining to plans to extend the navigation work to Morgantown, West Virginia. The Company completed that construction in 1884. In 1888, Congress enacted legislation

(Cont'd)

federal government not only took property used by the company to collect tolls, but the government also collected the same tolls. Significantly, in the years following the *Monongahela* case, the court narrowly interpreted it, saying, for example, that "[t]he franchise [ ] was not merely a contract in respect of the property taken, but was an integral part of it[.]" *Omnia Commercial Co., v. United States*, 261 U.S. 502, 513, 43 S.Ct. 437, 67 L.Ed. 773 (1923). And, the court interpreted the case as grounded primarily on the doctrine of estoppel. *See Greenleaf-Johnson Lumber Co. v. Garrison*, 237 U.S. 251, 265, 35 S.Ct. 551, 59 L.Ed. 939 (1915) (where the court noted its earlier decision in *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U.S. 82, 89, 33 S.Ct. 679, 57 L.Ed. 1083 (1913), "as sustaining the view that the case rested upon estoppel—rested upon the fact that the lock and dam had been constructed 'at the instance and implied invitation of Congress' "); *see also PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 n. 7, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980); *United States v. Rands*, 389 U.S. 121, 126, 88 S.Ct. 265, 19 L.Ed.2d 329 (1967); *Omnia Commercial Co.*, 261 U.S. at 513-14, 43 S.Ct. 437.

(Cont'd)

authorizing the Secretary of War to purchase, if necessary by condemnation, dam and lock No. 7 for a specified sum of money. The legislation specified that "in estimating the sum to be paid by the United States the franchise of said corporation to collect tolls shall not be considered or estimated." *Id.* at 313, 13 S.Ct. 622. The court reversed and remanded the case for a new trial on damages.

Mr. Mamo also relies on *Kimball Laundry Co. v. United States*, 338 U.S. 1, 69 S.Ct. 1434, 93 L.Ed. 1765 (1949), but that case, unlike the one before us, involved a temporary taking of the property and business. In stressing that the government had condemned the claimant's property for the very purpose of "carrying on the [laundry] business" for the war's duration, the Court in *Kimball* recognized the uniqueness of this "temporary interruption," which, unlike "the final severance of occupancy," "so greatly narrows the range of alternatives open to the condemnee that it substantially increases the condemnor's obligation to him." *Id.* at 12, 69 S.Ct. 1434. In addition, Mr. Mamo invokes *Almota Farmers Elevator & Warehouse Co., v. United States*, 409 U.S. 470, 93 S.Ct. 791, 35 L.Ed.2d 1 (1973). But, as the trial court recognized, that case concerned the very different issue of valuation of improvements to property by the holder of a leasehold interest the government was condemning. The question, the Court said, was "[w]hether, upon condemnation of a leasehold, a lessee with no right of renewal is entitled to receive as compensation the market value of its improvements . . . because of the expectancy that the lease would have been renewed." *Id.* at 473, 93 S.Ct. 791. While answering this question affirmatively, the Court stressed what it was not holding: "The only dispute in this case is over how those improvements are to be valued, not over whether Almota is to receive additional compensation for business losses. Almota may well be unable to operate a grain business elsewhere; it may well lose the profits and other values of a going business, but it seeks compensation for none of that." *Id.* at 475 n. 2,

93 S.Ct. 791. Citing *Mitchell, supra*, the Court then reiterated the principle that "the Government [is] not obliged to pay for business losses caused by condemnation." *Id.*

The Trial Court's Resolution of the Fifth Amendment Claim

Our *de novo* review of the record in the light most favorable to Mr. Mamo, and the legal principles reflected in the Supreme Court cases discussed above, reveals that the trial court properly granted summary judgment to the District on Mr. Mamo's Fifth Amendment claim, as a matter of law. *Ward One Democrats, Inc., supra*, 898 A.2d at 360; *Kelley, supra*, 676 A.2d at 456. Under general principles governing the Fifth Amendment Taking Clause, Mr. Mamo was not entitled to "consequential damages" for business losses, or even for the destruction of his business. *See Mitchell, supra.* Nor can he claim damages related to a temporary taking of his business as in *Kimball.* And, he candidly conceded during oral argument that he cannot prevail on a theory of compensation for his leasehold interest, which was extinguished prior to the District's taking of the Good Hope Road property.

Nor can Mr. Mamo recover under a theory that he has a protected statutory right or entitlement to consequential damages which is protected through the Fifth Amendment. He contends that his "franchise and the goodwill associated with it are recognized and protected under both local and federal law, and thus

clearly meet the test of an entitlement." We disagree. Nothing in the District's condemnation statute, D.C.Code § 16-1311, *et seq.* (2001), provides for the recovery of business loss, goodwill, or other such consequential damages. Nor is there any explicit provision in the District's Retail Service Station Act ("the RSSA"), D.C.Code § 36-301.01, *et seq.* (2001) which permits the recovery of such damages. Neither the RSSA's definition of goodwill in § 36-301.01, nor its § 36-303.05 governing the sale, assignment or other transfer of a marketing agreement, grants a statutory entitlement to the recovery of goodwill or business loss in eminent domain taking cases. Had the Council of the District of Columbia intended that the District compensate businesses like Mr. Mamo's for business loss, goodwill and other such consequential damages, its intent would be obvious on the face of the condemnation statute, or at least in its legislative history (on which Mr. Mamo does not rely). Since he cannot point to any District law which creates a protected property right, Mr. Mamo's reliance on *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984), to demonstrate that his "goodwill is a protected property interest subject to compensation" is unavailing. In *Ruckelshaus*, the Supreme Court declared "[t]hat intangible property rights protected by state law are deserving of the protection of the Taking Clause has long been implicit in the thinking of this Court[.]" *Id.* at 1003, 104 S.Ct. 2862. But, the court's specific holding was based on the principle that "property interests . . . are . . . created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Id.* at 1001, 104 S.Ct. 2862 (citations omitted).

As the court said: "[T]o the extent that Monsanto has an interest in its health, safety, and environmental data cognizable as a trade secret property right under Missouri law, that property right is protected by the Taking Clause of the Fifth Amendment." *Id.* at 1003-04, 104 S.Ct. 2862 (footnote omitted). Here, there is no District law creating a right to just compensation for consequential damages where the District takes property by eminent domain.

Furthermore, Mr. Mamo has not established, through nonconclusory evidence, that BP received compensation for goodwill or business loss for the Good Hope Road gas station and convenience store, and that he was entitled to share such compensation under 15 U.S.C. § 2802(d)(1) of the federal Petroleum Marketing Practices Act ("the PMPA").[5] What the court

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5. Section 2802(d)(1) of 15 U.S.C. provides:

> (d) Compensation, etc., for franchisee upon condemnation or destruction of marketing premises. In the case of any termination of a franchise (entered into or renewed on or after the date of enactment of this Act [enacted June 19, 1978]), or in the case of any nonrenewal of a franchise relationship (without regard to the date on which such franchise relationship was entered into or renewed)—
>
> (1) if such termination or nonrenewal is based upon an event described in subsection (c)(5) [condemnation or other taking under eminent domain power], the franchisor shall fairly apportion between the franchisor and the franchisee compensation, if any, received by the franchisor based upon any loss of business opportunity or good will[.]

declared in *Bajwa v. Sunoco, Inc.*, 320 F.Supp.2d 454 (E.D.Va.2004) is directly applicable in this situation. There, the Commonwealth of Virginia exercised its eminent domain power to take property on which Mr. Bajwa operated a Sunoco gas station dealer franchise; Sunoco terminated its franchise dealer agreement with Mr. Bajwa. The franchisee, like Mr. Mamo, maintained that the PMPA protected his franchise interest and required just compensation. But, the court declared:

> The PMPA does not entitle a franchisee to compensation from the owner for his leasehold in the event of a condemnation; the act only requires that "the franchisor shall fairly apportion between the franchisor and franchisee compensation, if any, received by the franchisor based upon any loss of business opportunity or good will." 15 U.S.C. § 2802(d)(1). Virginia law does not compensate the property owners for loss of business opportunity or good will. (Citation omitted). The sale price received by Sunoco, therefore, could not have contained compensation for business opportunity or good will. Accordingly, the PMPA does not require that Sunoco share the sale price with [Mr.] Bajwa. No other provision of the PMPA provides for compensation to [Mr.] Bajwa.

Id. at 459. Here, the District and BP obviously negotiated the sum of $722,180. which was paid to BP for its Good Hope Road property since the final payment differed from the initial amount offered by the District, but the

record is silent as to whether the condemnation price included any sum relating to Mr. Mamo's business. Under those circumstances, we cannot conclude that the PMPA's fair apportionment directive (15 U.S.C. § 2802(d)(1)) was violated. Significantly, in accordance with Mr. Mamo's franchise agreement, BP terminated his lease prior to the date of condemnation; hence he no longer had a leasehold interest, and the District's condemnation law does not authorize recovery of business loss or goodwill. In short, the PMPA is of no assistance to Mr. Mamo. *See Bajwa; see also Heir v. Delaware River Port Auth.*, 218 F.Supp.2d 627, 638-39 (D.N.J.2002) (stating that "the right to compensation extends only as far as a party's contractual rights permit"; the gas station and convenience store owner franchisee "contracted away [ ] right to continuation of [ ] franchise beyond [the eminent domain condemnation]," and hence, he is "not entitled to any compensation for the losses resulting from [the taking].") (citations omitted).

In short, Mr. Mamo cannot prevail under any of his Fifth Amendment arguments. Judge Morin did not err by treating Judge Campbell's ruling on the District's motion *in limine* as a decision concerning Mr. Mamo's entitlement to consequential damages and as a basis for granting the District's motion for partial summary judgment. Therefore, for the reasons set forth in this opinion, in Appeal No. 06-CV-845, the trial court properly granted judgment as a matter of law in favor of the District on the issue of Mr. Mamo's right to damages for his franchise interest, business losses and goodwill.

Appendix A

The Promissory Estoppel Issue

Finally, Mr. Mamo insists that the District was estopped from denying him compensation because the District's letter of October 27, 2000, promised his attorney that: "your client will be properly compensated for his leasehold interest; his business; and goodwill." He contends that the trial court "erred when it found that the District was not estopped from taking a legal position diametrically opposed to that which induced Mr. Mamo's reliance." The District asserts that Mr. Mamo failed to establish the necessary elements of promissory estoppel. Judge Morin's amended order in Appeal No. 06-CV-845, granted the District summary judgment on Mr. Mamo's promissory estoppel claim, on the basis that even assuming that the "representations" in Mr. Teasley's October 27, 2000 letter regarding compensation for his consequential damages "were authorized and binding on the District," Mr. Mamo failed to "make [a] showing of any specific injury suffered by [him]."

"[T]o successfully raise an estoppel argument against the District, [Mr. Mamo] 'must show that the District made a promise, that [he] suffered injury due to reasonable reliance on the promise and that enforcement of the promise would be in the public interest and would prevent injustice.' " *Hospitality Temps Corp. v. District of Columbia*, 926 A.2d 131, 139 (D.C.2007) (quoting *District of Columbia v. McGregor Props.*, 479 A.2d 1270, 1273 (D.C.1984)); *see also Leonard v. District of Columbia*, 801 A.2d 82, 86 (D.C.2002); *Chamberlain v. Barry*, 606 A.2d 156, 158 (D.C.1992). Under the circumstances of this case,

we conclude that Mr. Mamo "could not reasonably have relied on the purported authority of [Mr. Greg Teasley, the District of Columbia Department of Housing and Community Development employee (project manager) who signed the letter of October 27, 2000], as distinct from the Mayor or his designee, to bind the District." *Leonard*, 801 A.2d at 86. There is no showing on this record that Mr. Teasley had been delegated authority to commit the District to pay business loss and goodwill damages. Even assuming he had such authority, the District's condemnation statute did not provide for the payment of such consequential damages upon the exercise of the power of eminent domain. Moreover, Mr. Mamo has not demonstrated that he relied to his detriment on Mr. Teasley's promises. Nor has Mr. Mamo shown any misconduct on the part of Mr. Teasley or other District government official for the nonpayment of such damages; but, as we have stated, " 'the doctrine of equitable estoppel, if applicable against the government at all, may be invoked only where there is a showing of some type of affirmative misconduct by a government agent.' " *Leekley v. District of Columbia Dep't of Employment Servs.*, 726 A.2d 678, 680 (D.C.1999) (quoting *Robinson v. Smith*, 683 A.2d 481, 492 (D.C.1996)). On this record, we discern no affirmative misconduct by the District. In sum, because Mr. Mamo failed to establish an element of promissory estoppel, he cannot prevail on that theory; and thus, Judge Morin properly granted the District's motion for partial summary judgment in Appeal No. 06-CV-845. *See Kelley*, *supra*, 676 A.2d at 456; *Leonard*, 801 A.2d at 86; *Leekley*, 726 A.2d at 680.

Appendix A

Appeal No. 06-CV-1007

The trial court incorporated its final order relating to the District's lawsuit in its final order dismissing Mr. Mamo's lawsuit, with prejudice. It then granted the District's motion to dismiss "on the basis of *res judicata* and/or collateral estoppel, because the court has previously decided the same issue [Mr. Mamo] uses as a basis for compensation in this case." With respect to a motion to dismiss, we review the allegations of the complaint in the light most favorable to the nonmoving party, and "[d]ismissal is impermissible unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [his] claim which would entitle [him] to relief." *Jordan Keys & Jessamy, LLP v. St. Paul Fire & Marine Ins. Co.*, 870 A.2d 58, 62 (D.C.2005). "Under the doctrine of claim preclusion (*res judicata*), a valid final judgment on the merits absolutely bars the same parties from relitigating the same claim in a subsequent proceeding." *Parker v. Martin*, 905 A.2d 756, 762 (D.C.2006) (cases and internal quotation marks omitted). Mr. Mamo does not assert that the dismissal of his lawsuit on *res judicata* grounds constituted error. Indeed, he states that his lawsuit "was filed as a precaution to address procedural concerns advanced by the District that [his] claims for compensation separate from the real estate interest could only be raised in a separate action." Since he sought to relitigate, with the same parties, the same claim pertaining to consequential damages that the trial court resolved against him in the District's lawsuit, the trial court properly dismissed his action. *Id.*

Accordingly, for the foregoing reasons, we affirm the judgment of the trial court.

So ordered.

APPENDIX B — ORDER OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, CIVIL DIVISION DATED JULY 28, 2006

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

Civil Case No. 06-CA-1213

Calendar 12
Judge Robert E. Morin

EYOB MAMO, *et al.*,

Plaintiff,

v.

DISTRICT OF COLUMBIA,

Defendant.

ORDER

This comes before the Court on Defendant District of Columbia's Motion to Dismiss and Plaintiff's Opposition thereto. The Court previously dismissed the matter and then vacated that dismissal upon Plaintiff's request to file an opposition. Plaintiff filed his opposition that raises the same arguments previously presented and rejected in Case No. 04-CA-5088, (*District of Columbia v. All of the Parcel of Land Identified as Lot 0054 in Square 5601 in the District of Columbia and BP, Products North America, Inc.*).

Wherefore, for the reasons stated and for the reasons stated in the Court's order in Case No. 04-CA-5088, (*District of Columbia v. All of the Parcel of Land Identified as Lot 0054 in Square 5601 in the District of Columbia and BP, Products North America, Inc.*), which is incorporated herein, it is this __ day of July, 2006 hereby,

ORDERED, that the Defendant District of Columbia's Motion to Dismiss is granted on the basis of res judicata and/or collateral estoppel, because the Court has previously decided the same issue Plaintiff uses as a basis for compensation in this case; it is further,

ORDERED, that the Plaintiff's Complaint is dismissed, with prejudice.

s/ Robert E. Morin 7/28/06
Judge Robert E. Morin
(Signed in Chambers)

APPENDIX C — AMENDED ORDER OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, CIVIL DIVISION DATED JUNE 26, 2006

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

Civil Case No. 04ca5088(rp)

Calendar 12
Judge Robert E. Morin

DISTRICT OF COLUMBIA,

Plaintiff,

v.

ALL OF THE PARCEL OF LAND IDENTIFIED AS LOT 0054 IN SQUARE 5601 IN THE DISTRICT OF COLUMBIA AND BP PRODUCTS NORTH AMERICA, INC,

Defendants.

AMENDED ORDER[1]

This matter comes before the Court on (1) Plaintiff District of Columbia's ("District") Motion for Summary Judgment and Defendants Eyob Mamo and DAG Petroleum's ("Defendants") Opposition thereto and

1. The original June 21, 2006 Order is amended *nunc pro tunc* to correct certain typographical errors identified by the parties. The substance of the original Order is not changed.

(2) Defendants' Motion to Consolidate with case 06-CA-1213 and the District's Opposition thereto.

This case involves the District's condemnation of property located at 1234 Good Hope Road, S.E. At the property Defendants operated a gas station/convenience store under a lease/petroleum marketing franchise agreement with BP Products of America, Inc. ("BP") (aka Amoco Oil company). No Defendant challenges the District's authority to take the property by condemnation, and the District has deposited $722,180 in estimated just compensation into the Registry of the Court. Rather, the dispute involves Defendants' claim that they should be compensated for the value of their lost business and its goodwill because its petroleum franchise was unique and site specific. Defendants suggest that the District's taking of the property had the inevitable effect of depriving them of the value of their business.[2]

The issue comes to the Court in an unusual posture. Initially, Defendants presented their claim for compensation in a counterclaim. Eventually, the Court, Judge Campbell presiding, struck the counterclaim but with a statement that "the matters asserted in the counterclaim are adequately stated in defendants' Answer to the Complaint." (March 1, 2005 Order.) Thereafter, the District filed a motion *in limine* seeking to exclude proof of the Defendants' damages to loss of

2. It is undisputed that under the franchise/lease agreement, the institution of the condemnation proceeding provided a basis for BP to terminate the lease, which it did.

business and goodwill. (*See* April 14, 2005 Order, denying motion *in limine*.) The District then filed a motion to vacate the Order that effectively allowed Defendants to present evidence of loss and be compensated for the value of the lost business. In response, on April 24, 2006, Judge Campbell vacated the April 14, 2005 Order and ruled that Defendants were precluded from recovering compensation for the loss of the value of their business (as opposed to the value of the property interest, *i.e.*, leasehold). Although styled as a ruling on the motion *in limine*, Judge Campbell's April 24 Order addressed the substance of Defendants' claims that the District was required to compensate them for the value of their lost business and goodwill.[3]

While this was occurring, on virtually the same day that Judge Campbell vacated his previous order, the District filed a motion for partial summary judgment in this matter, raising in substance the same issues that were before Judge Campbell in the District's motion to vacate. This motion is presently before the Court.

In addition, Defendants filed an affirmative action in a separate matter, 06-CA-1213, raising their claim for compensation as a "precaution" in the event that the Court ruled that procedurally they could not pursue their claim for compensation in a condemnation action. This

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3. On January 1, 2006 the case was transferred from Judge Campbell to Judge Morin in accordance with the normal reassignment of calendars. Judge Campbell, however, retained motions filed before the end of the calendar year, as well as motions seeking reconsideration of his earlier rulings.

new matter was assigned to Judge Fisher's calendar, but Defendants filed a motion to consolidate, which is opposed by the District.

The District correctly points out that Judge Campbell, by his April 24, 2006 order, ruled in its favor on the substantive question of whether the District was liable for consequential damages to Defendants' business that resulted from the exercise of the eminent domain to take real property. Generally, under the law of the case doctrine, this Court is not normally in a position to re-visit the issue. *See Pannell v. District of Columbia*, 829 A.2d 474, 477 (D.C. 2003) ("The 'law of the case' doctrine bars a trial court from reconsidering the same question of law that was presented to and decided by another [judge] of coordinate jurisdiction. . . .") (*quoting Tompkins v. Washington Hosp. Ctr.*, 433 A.2d 1093, 1098 (D.C. 1981)). The doctrine is applicable when: (1) the prior ruling has "sufficient finality"; (2) the earlier ruling is not clearly erroneous considering any new facts or a change in substantive law. *Johnson v. Capitol City Mortgage Corp.*, 723 A.2d 852, 857 (D.C. 1999) (*quoting Johnson v. Fairfax Vill. Condo., IV Unit Owners Ass'n*, 641 A.2d 495, 503 (D.C. 1984) (other citation omitted).

The Defendants correctly counter, however, that the Court of Appeals has held that the law of the case doctrine does not apply on a motion *in limine* concerning evidentiary rulings, because the Court can revisit its pre-trial evidentiary rulings. *See Jung v. George Washington Univ.*, 875 A.2d 95, 103 (D.C. 2005) (". . . rulings on motions *in limine* normally are considered provisional

in the sense that the trial court may revisit its pre-trial evidentiary rulings."). This is so because later issues raised and evidence presented at trial may affect an earlier determination of the admissibility of evidence. This further development of the record may cause the trial court to reconsider a previous pre-trial evidentiary ruling, because the pre-trial ruling may not have taken into account the other evidence that the parties and court did not reasonably contemplate.

With respect to the District's earlier motion, while it was styled as one "*in limine*," "[t]he label on the request for relief is not determinative." *Farmer v. Farmer*, 526 A.2d 1365, 1369 (D.C. 1987). Unlike many *in limine* pre-trial evidentiary motions, the District by its motion was not seeking to prevent Defendants from introducing a certain "type" of evidence in support their claim for compensation of the loss of business value, but seeking to prevent Defendants from pursuing the claim at all. Consequently, the effect of Judge Campbell's April 24 ruling was not, as Defendants suggest, a pre-trial determination that certain evidence was inadmissible, but that the Defendants could not pursue their claim for certain damages in the first instance. In effect, Judge Campbell decided the precise legal issue that is now presented in the District's motion for partial summary judgment, which is presently before the Court. Moreover, because the issue is a legal one, not related to other possible trial evidence, it will not be affected by further developments at trial. In this regard, Judge Campbell's ruling had "sufficient finality" on the issue of whether Defendants may pursue their claim for

compensation of lost business to invoke the law of the case doctrine. Because Judge Campbell's April 24 Order cites and analyses Supreme Court and Court of Appeals precedents that have not been overruled, this Court cannot say that Judge Campbell's ruling barring Defendants from compensation for business loss was clearly erroneous.

One outstanding issue is Defendant's claim that they are entitled to compensation because of purported representations by District agents, arguably counter to then-existing law, that they would be compensated for the value of their business and its goodwill. Under the Defendants' theory, because of these representations the District is now estopped from denying them such compensation in this case. This issue was not expressly addressed by Judge Campbell, nor was it specifically addressed in the District's memorandum in support of its motion.

In certain, but not all, circumstances, the District may be estopped from raising claims and defenses. The Court of Appeals has held that the District is estopped from taking a position when (1) the District made a promise to Defendants, (2) the Defendants suffered injury due to reasonable reliance on it, and (3) the promise must be enforced to prevent injustice and to promote the public interest. *T.K Chamberlain v. Barry*, 606 A.2d 156, 158 (D.C. 1992). The record before the Court suggests that in its early pre-filing discussions with Defendants concerning the condemnation of the property, at a time when the parties would initially be

seeking to resolve the matter without resort to protracted legal proceedings, the District represented orally and in writing that it would compensate them for the value of the property and the loss of the business and its goodwill, a position which conflicts with that which it now takes. (Def.'s Opp'n to Summ. J., Exs. 3-5.) Even if these representations were authorized and binding on the District, that does not end the inquiry. The purported "injury" suffered by the Defendants as a result of these representations is at best amorphous. In his affidavit in support of Defendants' opposition, Mr. Mamo avers that:

> For several years before receiving the formal notice of condemnation from the District and termination notice from BP, I was led to believe by several District of Columbia government officials that I and DAG would be compensated for our franchise interest and goodwill. As a result of these representations, which were made to me, and to Councilman Mendelson (in letters attached to the Summary Judgment Opposition), I was given a false sense of security by the District of Columbia at a time when I could have taken action to try to protect my business interests at Good Hope Amoco in other ways, such as through different business, political or other strategy both with the District and BP.

(Def.'s Opp'n to Summ. J., Ex. A, Mamo Aff. ¶ 10.) Even accepting these averments as true and taking them in

their best light, Mr. Mamo makes no showing of any specific injury suffered by Defendants. His assertions that had he known that the District would now argue that he could not be compensated for the value of his franchise, he would have taken some unspecified "action" to protect his business through different "business, political or other strategy," while possibly understandable in retrospect, provides an insufficient basis for the Court to find that he suffered detrimental injury than that which would otherwise have occurred.

Moreover, there is no showing that preventing the District from asserting a legal argument, which is fully supported by the law, is necessary to prevent an injustice or promote the public interest. Certainly, if originally Defendants were not entitled to the compensation that they now seek, as Judge Campbell ruled, it is not unjust to uphold the District's position at this time even if it had discussed compensating the Defendants prior to the filing of this action. Moreover, while there certainly is a public interest that all persons that are the subject of a condemnation action be treated fairly and justly compensated, there is also a public interest in limited public funds not be expended arbitrarily, or that persons are not treated differently with regard to the condemnation compensation awards. As observed by the District, it has consistently asserted in other eminent domain proceedings that the Court may not entertain any request for affirmative relief such as the Defendants seek, (*see* Pl.'s Opp'n to Mot. to Consolidate at 3, listing cases in support), and its position has been upheld by other judges without exception.

Because the Court's ruling, the Defendants' motion for consolidation is also denied for the reasons stated in the District's opposition, although the Presiding Judge of the Civil Division (Judge Zeldon) had decided to assign the other matter to this Court as a related case.

Wherefore, for the reasons stated, it is this __ day of June 2006 hereby,

ORDERED, that the District's motion for partial summary judgment is granted; it is further,

ORDERED, that Defendants' motion to consolidate is denied.

s/ Robert E. Morin 6/26/06
Judge Robert E. Morin
(Signed in Chambers)

APPENDIX D — ORDER OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, CIVIL DIVISION DATED APRIL 21, 2006

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

Civil Action No. 04CA5088RP
Judge John M. Campbell
Calendar 12

DISTRICT OF COLUMBIA

Plaintiff

v.

ALL OF THE PARCEL OF LAND IDENTIFIED AS LOT 0054 IN SQUARE 5601 IN THE DISTRICT OF COLUMBIA AND BP PRODUCTS NORTH AMERICA, INC., et al

Defendants

ORDER

This is before me on the plaintiff District of Columbia's **Motion to Vacate Order Denying Plaintiff's Motion in Limine**. On closer consideration of the question raised, I conclude that my previous order was in error. The Plaintiff's Motion to Vacate will be ***granted***, and the plaintiff's earlier Motion in Limine will also be ***granted***.

Appendix D

Defendants' basic position in this condemnation action is that the government should compensate them, not just for the value of the real property being condemned, but also for the fair market value of their business, including such interests as good will. Plaintiff filed its motion in limine seeking to preclude proof at trial of such intangible interests. Plaintiff relied on the District's condemnation statute, D.C. Code § 16-1311, as well as on general due-process and eminent-domain principles enunciated in such cases as *Sawyer v. Commonwealth*, 65 N.E. 52 (Mass. 1902) (Holmes, C.J.), *Mitchell v. United States*, 267 U.S. 341 (1925), and *United States v. General Motors Corp.*, 323 U.S. 373 (1945). These cases state variations of the principle that a business is not "property" within the meaning of takings law, *Sawyer*, 65 N.E. at 53-54, and that no recovery can be received for the taking of a business, its future profits, or its good will. *Mitchell*, 267 U.S. at 345-46; *General Motors*, 323 U.S. at 379.

Defendants responded by citing to language from more recent Supreme Court cases, including *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949), and *Almota Farmers Elevator and Warehouse Co. v. United States*, 409 U.S. 470 (1973). In *Kimball Laundry*, Justice Frankfurter stated that "an exercise of the power of eminent domain which has the inevitable effect of depriving the owner of the going concern value of his business is a compensable 'taking' of property." 338 U.S. at 13. Here, defendants argued that the taking of this property "inevitably" deprived them of the "going concern value" of their business; that is, the

condemnation terminated their lease-franchise agreement with BP, and without a franchise, they would not be able to relocate their business. Defendants also pointed to language in *Almota* concerning paying compensation for the market value of leaseholds.

These cases, however, do not in fact stand for the propositions that defendants advance. *Kimball Laundry* involved the *temporary* taking, during wartime, of a laundry facility to be used by the Army for its troops. The Supreme Court confirmed the general principle that the loss of business good will as a result of a taking is *not* compensable, citing the same cases relied on here by plaintiff– *Sawyer*, *Mitchell*, and *General Motors*. *See* 338 U.S. at 11-12. In the special situation presented, however, the "temporary interruption" of the laundry's business operation meant that the laundry had no choice but to wait for the government's use of its facility to conclude. It would have made no sense to open a new facility, knowing that eventually the military would return the existing one. The result announced in *Kimball Laundry*, on its peculiar facts, was simply this: "the temporary interruption as opposed to the final severance of occupancy so greatly narrows the range of alternatives open to the condemnee that it substantially increases the condemnor's obligation to him." 338 U.S. at 15. The facts here, of course, involve the "final severance of occupancy," and *Kimball Laundry* has no application to them.

The *Almota* case is also inapposite. There, the government condemned land leased by the Almota

company on which the company had constructed extensive buildings and other improvements. The only issue before the Court was how to value the improvements. The government sought to pay compensation for the value of the improvements over the remaining seven years of the lease. The Court, however, concluded that the correct measure of damages was the value of the improvements over their useful life, not just the remaining lease term. 409 U.S. at 473. The Court specifically noted that Almota was *not* seeking compensation for intangible business losses and "other values of a going business," and emphasized that such interests are not compensable in any event. *Id.* at 475 n.2. The case therefore provides no support for defendants' position here.

I am satisfied, on further review, that the principles articulated by the plaintiff control this situation. Defendants are entitled to compensation for the loss of their property interest, but not to intangible value of their business.

Accordingly, it is this 21st day of April, 2006, hereby

ORDERED, that the plaintiff's Motion to Vacate Order is **GRANTED**, that the Court's order dated April 14, 2005, is *vacated*, and that the plaintiff's Motion in Limine is **GRANTED**.

s/ John M. Campbell
John M. Campbell
Associate Judge
Signed in chambers

APPENDIX E — ORDER OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, CIVIL DIVISION DATED MARCH 1, 2005

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

Civil Action No. 04CA5088RP
Judge John M. Campbell
Calendar 12

DISTRICT OF COLUMBIA

Plaintiff

v.

ALL OF THE PARCEL OF LAND IDENTIFIED AS LOT 0054 IN SQUARE 5601 IN THE DISTRICT OF COLUMBIA AND BP PRODUCTS NORTH AMERICA, INC., et al

Defendants

ORDER

This is before me on the plaintiff's **Motion to Dismiss Counterclaim**. Having considered the motion and the opposition, it is this 1st day of March, 2005, hereby

ORDERED, that the motion is **GRANTED**, on the ground that no "counterclaims" are permitted under Super. Ct. Civ. R. 71A, and that the matters asserted in the counterclaim are adequately stated in the defendants' Answer to the Complaint.

s/ John M. Campbell
John M. Campbell
Associate Judge
Signed in chambers